No. 83-1850

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FORREST BUGHER, et al.,

Petitioners,

vs.

JACK FEIGHTNER, d/b/a
FEIGHTNER EXCAVATING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, NO. 81-2899

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TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
THE DECISION OF THE COURT OF APPEALS WAS CORRECT	3
THERE IS NO CONFLICT WITHIN THE CIRCUIT OR BETWEEN TWO OTHER CIRCUIT COURTS OF APPEAL	6
CONCLUSION	9

TABLE OF AUTHORITIES

PAGE

Calamia v. *Spivey*, 632 F.2d 1235 (5th Cir. 1980).. 8

Calhoun v. *Bernard*, 333 F.2d 739 (9th Cir. 1964). 4

Carbon Fuel Co. v. *Mineworkers*, 444 U.S. 212 (1979)..... 2

Curtis v. *Loether*, 415 U.S. 189 (1974)..... 3, 9

Dairy Queen, Inc. v. *Wood*, 369 U.S. 469 (1962).... 9

Huge v. *Longs' Hauling Co., Inc.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979)..... 4

In re Vorpahl, 695 F.2d 318 (8th Cir. 1982)..... 8

Laborers Fringe Benefit Funds v. *Northwest Concrete*, 640 F.2d 1350 (6th Cir. 1981)..... 3, 5

Lewis v. *Benedict Coal Corp.*, 361 U.S. 459 (1960), 4 L.Ed.2d 442, 80 S.Ct. 489 (1960) 4, 7

Lewis v. *Kepple*, 185 F.Supp. 884 (W.D. Pa. 1960), aff'd, 287 F.2d 409 (3d Cir. 1961) 4, 7

Lewis v. *Mill Ridge Coal, Inc.*, 298 F.2d 522 (6th Cir. 1964) 4

Wardell v. *Central States Southeast and Southwest Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981)..... 6

Other Authorities

29 U.S.C. § 185(a)..... 4

29 U.S.C. § 1132(a)(3)..... 5

Restatement (Second) of Trusts § 197 7

Restatement (Second) of Trusts § 280, Comment b 7

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STATEMENT OF THE CASE

Petitioners' statement is in many ways incorrect and in others, inappropriate. The petition in this case ignores the background to the jury trial issue. It ignores what was the principal issue in the district court and seeks to prejudice this Court by quoting from the district court's findings which were primarily the proposed findings submitted by petitioners. Petitioners' reference to these findings is inappropriate since they

well know that the respondent Feightner had raised in the court of appeals substantial questions about those findings not being sustained by the evidence (Pet. App. p. 2(a)) which the court of appeals found it need not reach by reason of its decision on the jury trial issue (Pet. App. p. 10(a)). The court of appeals correctly stated the background as follows:

> "Plaintiffs, the trustees of certain union trust funds, brought this action seeking delinquent contributions allegedly due as the result of a collective bargaining agreement between the defendant and the union.
>
> Feightner denied liability, claiming at trial that the multi-employer collective bargaining association which had purportedly signed on his behalf did not have authority to bind him."

By the time of the trial, Feightner had resigned from the association so that there was no question but that he was not bound by any subsequent agreements. Thus, the only issues to be tried were whether or not the association had the authority to bind him under the common law standards of agency as was held in *Carbon Fuel Co.* v. *Mineworkers,* 444 U.S. 212 (1979); and if the association had such authority, how much did he owe.

Petitioners' statement at page two of the petition that its complaint sought specific performance is incorrect. The court of appeals described the complaint at p. 2(a) of Pet. App. as follows:

> "Plaintiffs' complaint alleged that their claim arose under 29 U.S.C. § 1132, the civil enforcement provision of the Employee Retirement Income Security Act (hereafter "ERISA"), and 29 U.S.C. § 185(a) of the Labor Management Relations Act. While seeking monetary relief the complaint only requested equitable remedies, i.e., an accounting and a grant of specific performance. Contemporaneously with the filing of his answer, the appellant demanded a jury trial. Prior to trial the appellees filed a Motion to Strike Defendants' Jury Demand and the issue

was briefed for the court. The district judge granted the motion noting that plaintiffs had only requested equitable relief and that 29 U.S.C. § 1132(a)(3) only authorized that type of remedy. Feightner has appealed that ruling, noting that under Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) the form of remedy requested in the complaint does not control the characterization of the action as legal or equitable for purposes of the Seventh Amendment."

Therefore, the facts of this case in no way called for the granting of equitable relief as in *Laborers Fringe Benefit Funds* v. *Northwest Concrete,* 640 F.2d 1350 (6th Cir. 1981) where the district court and the court of appeals found equitable relief to be appropriate under the same sections of ERISA as are involved here.

THE DECISION OF THE COURT OF APPEALS WAS CORRECT

The petitioners correctly state that Congress may create new rights and remedies which can be enforced without the participation of a jury, but incorrectly rely upon cases where the remedy provided is in an administrative proceeding rather than in a district court.

As this court said in *Curtis* v. *Loether,* 415 U.S. 189 (1974), at pages 193 and 194:

> "Petitioner nevertheless argues that the Amendment is inapplicable to new causes of action created by congressional enactment. As the Court of Appeals observed, however, we have considered the applicability of the constitutional right to jury trial in actions enforcing statutory rights "as a matter too obvious to be doubted." 467 F.2d, at 1114. Although the Court has apparently never discussed the issue at any length, we have often found the Seventh Amendment applicable to causes of action based on statutes. See, e.g., Dairy Queen, Inc. v. Wood, 369 US 469, 477, 8 L Ed 2d 44, 82 S Ct 894 (1962) (trademark laws); Hepner v. United States, 213 US 103, 115, 53 L Ed

> 720, 29 S Ct 474 (1909) (immigration laws); cf. Fleitmann v. Welsbach Street Lighting Co., 240 US 27, 60 L Ed 505, 36 S Ct 233 (1916) (antitrust laws), and the discussion of Fleitmann in Ross v. Bernhard, 396 US 531, 535-536, 24 L Ed 2d 729, 90 S Ct 733 (1970). Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."

This court then discussed instances where statutory rights were not to be subject to trial by jury, and then concluded at page 195:

> "These cases uphold congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment. But when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional jurisdiction for denying the jury right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law."

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) has long been relied upon as the basis for trustees' actions to collect delinquent contributions from employers. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis* v. *Mill Ridge Coal, Inc.*, 298 F.2d 522 (6th Cir. 1964); *Calhoun* v. *Bernard,* 333 F.2d 739 (9th Cir. 1964); and *Huge* v. *Longs' Hauling Co., Inc.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied,* 442 U.S. 918 (1979). Jury trials were recognized in that type of action. *Lewis* v. *Benedict Coal Corp., supra,* and *Lewis* v. *Kepple,* 185 F. Supp. 884 (W.D. Pa. 1960), *aff'd,* 287 F.2d 409 (3d Cir. 1961). Therefore, suits for the collection of delinquent contributions have long been authorized under the Labor Management Relations Act (29 U.S.C. § 185(c)) and the present issue is whether or not Congress intended to do away with such actions at law and substitute a solely equitable

remedy when it enacted 29 U.S.C. § 1132(a)(3) which authorized actions by trustees to obtain *appropriate* equitable relief to enforce the terms of a plan.

The legislative history, as petitioners suggest, shows an intent to provide more remedies. However, the legislative history does not show a legislative intent to substitute equitable remedies for the existing remedies at law. In *Laborers Fringe Benefit Funds* v. *Northwest Concrete, supra,* a case where the district court and the court of appeals held equitable relief to be appropriate, the court said at page 1352:

> "The legislative history underlying section 502 indicates that Congress intended that the enforcement provisions should have teeth: the provisions should be liberally construed "to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act." H.R. Rep. No. 93-533, 93d Cong., 2d Sess. 17, reprinted in [1974] U.S. Code Cong. § Ad. News, p. 4639, 4655. This history further states that "[t]he intent of the Committee is to provide *the full range of legal and equitable remedies* available in both state and federal courts and *to remove jurisdictional and procedural obstacles* which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants." *Id.* (Emphasis supplied.)

As Circuit Judge Wood noted in his concurring opinion (Pet. App. p. 10a and 11a), the language of 29 U.S.C. § 1132(a)(3) is "to obtain other appropriate equitable relief . . ." and not to substitute equitable remedies for legal remedies in this area. See also opinion of the court at Pet. App. p. 7a.

Thus, the Congressional intent was to provide more effective remedies, both legal and equitable, and not to take away the trustees' legal remedies and provide only equitable remedies. Nothing quoted by the petitioners at pages 6 through 16 is contrary to this expressly stated congressional intent quoted above in *Laborers Fringe Benefit Funds* v. *Northwest*

Concrete, supra. Petitioners have, instead, taken the Congressional concern about the adequacy of existing remedies and drawn an unsupported conclusion that Congress intended to take away the trustees' remedies at law and provide them solely with equitable remedies. Not only is this inconsistent with the express intent "to provide the full range of legal and equitable remedies . . ." but nowhere does the legislative history state an intent to deprive trustees of their pre-existing remedies at law and to provide instead only equitable remedies.

As previously noted, this was not a case calling for equitable relief. Feightner had resigned from the association which purported to bind him and did not execute a new contract with the union when the existing contract expired. If there were a question of whether he was operating under the union contract previously, that question had been resolved by a clear showing that he was operating non-union by the time the district court struck the jury demand. Therefore, the question of any future compliance was not before the district court. The sole question was whether the association had in the past the power to bind him to the union contract, and if it did, how much did he owe. This is not the type of issue that mandates the deprivation of the right to jury trial.

THERE IS NO CONFLICT WITHIN THE CIRCUIT OR BETWEEN TWO OTHER CIRCUIT COURTS OF APPEAL

The case of *Wardell* v. *Central States Southeast and Southwest Areas Pension Fund,* 627 F.2d 820 (7th Cir. 1980), *cert. denied,* 449 U.S. 1112 (1981), was a beneficiary's action against the trustee of the fund. The court of appeals there held that the plaintiff beneficiary was not entitled to a jury trial. The court's logic in *Wardell* was predicated upon the fact that beneficiaries' actions against trustees have historically been equitable actions and that Congress was merely giving the

district courts jurisdiction over these traditional equitable remedies. The court there said at page 829:

> "We conclude that Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants are equitable. Such suits under the law of trusts have existed for quite a while in state courts and have been entertained in federal courts under their diversity jurisdiction. These suits have been considered equitable in character. See Davis v. Huge, 91 L.R.R.M. 2234 (E.D. Ky. 1975); Genesta v. San Diego County Laborers' Pension Plan, 87 Lab. Cas. § 11702, at 22827 (S.C. Del. 1979); Porter v. Central States Pension Fund, 98 L.R.R.M. 3210 (N.D. Iowa 1978); Sichko v. Lewis, 191 F.Supp. 68 (W.D. Pa. 1960). This conclusion has been based primarily on the law of trusts, which provides a beneficiary with a legal remedy only with respect to money the trustee is under a duty to pay unconditionally and immediately to the beneficiary. Restatement (Second) of Trusts §§ 197-198 (1959). *Thus the most reasonable interpretation is that Congress intended to provide general federal jurisdiction over these equitable suits that had traditionally been brought in state courts." (Emphasis supplied.)*

Historically, beneficiaries of a trust had *no adequate remedy at law* against trustees. It was only the courts of equity which would interfere and grant relief. Restatement (Second) of Trusts § 197. On the other hand, actions by trustees on contracts against third persons have traditionally been recognized as actions at law. Restatement (Second) of Trusts § 280, Comment b. *Lewis* v. *Benedict Coal Corp.,* 361 U.S. 459, 4 L. Ed. 2d 442, 80 S. Ct. 489 (1960). *Lewis* v. *Kepple,* 185 F. Supp. 884, *aff'd,* 287 F.2d 409 (3rd Cir. 1961). This distinction was expressly noted in Circuit Judge Wood's concurring opinion (Pet. App. p. 12a) in which Circuit Judge Bauer concurred and in Senior District Judge Campbell's Opinion of the Court (Pet. App. p. 8a).

Petitioners' contention that in *Wardell* the plaintiff had an adequate remedy at law is just plain incorrect. The *Wardell* plaintiff had no adequate remedy at law and the remedy that had been historically and traditionally provided to such beneficiaries had been the remedy which equity had devised. Under these circumstances, petitioners' contention that the decision in the present case is inconsistent with *Wardell* has no basis.

The cases of *In re Vorpahl,* 695 F. 2d 318 (8th Cir. 1982) and *Calamia* v. *Spivey,* 632 F.2d 1235 (5th Cir. 1980) are actually cases which followed and relied upon *Wardell.* They only applied the same historical equitable remedy which equity had provided the beneficiary against a trustee in a case where the beneficiary historically had no adequate remedy at law.

The present case is not one by a beneficiary charging the trustee with not discharging his trust. It is an action in contract for damages. Such actions have always been actions at law.

Once the historical background to the two types of actions is present, it becomes obvious that there is no conflict within the Court of Appeals for the Seventh Circuit nor is there any conflict with the Fifth and Eighth Circuit Courts of Appeal in their following the decision of the Court of Appeals for the Seventh Circuit in *Wardell.*

Finally, petitioners ignore the fact that the Court of Appeals for the Seventh Circuit pointed out that it was this historical background that distinguished the instant case from *Wardell* and it was the Court of Appeals for the Seventh Circuit which pointed out that the Fifth and Eighth Circuits had followed the Court of Appeals of the Seventh Circuit's decision in *Wardell.* (Pet. App. pp. 12(a) and 13(a).)

CONCLUSION

There is no question but that the Court of Appeals for the Seventh Circuit correctly followed the decisions of this Court in *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469 (1962) and *Curtis* v. *Loether,* 415 U.S. 189 (1974) and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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